Nos. 14,515 and 14,501

IN THE

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Plaintiffs and Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY, *Defendants and Appellees.*	No. 14,515
IN RE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14,501

APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

WESTERN PACIFIC RAILROAD CORPORATION,
ALEXIS I. DU PONT BAYARD, Receiver,
Appellants.

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
1203 Central Bank Building, Oakland 12, California,
Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Authorities Cited

Cases

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APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

As appellants' counsel view the appellee's motions to dismiss or affirm, they are made without any serious expectation of success. The purpose we visualize is a covert gesture of innocence in withholding from the

Interstate Commerce Commission and from the participating preferred stockholders information respecting the pendency of the appellants' appeals in this Court.

The motions are without merit.

Three grounds are alleged in No. 14,515:

(a) This appeal is frivolous and presents no substantial question;

(b) The appeal is a contempt of Court; and

(c) The appellate proceeding has been, and unless it is dismissed will continue to be used by appellants for improper purposes of vexation and harassment.

We shall take these up in their reverse order.

(1) What is meant by the appellee's reference to this appeal as one being "used by appellants for improper purposes of vexation and harassment" is made clear in its memorandum, where counsel say: "Appellants relying upon the fact that these appeals are pending, have undertaken to criticize the exchange proposals and to call for an I. C. C. hearing—all this in the hope, no doubt, that in order to be free of their interference appellees would make some payment to them for their worthless claims."

Although we apprehend that it may be difficult for appellee's counsel to understand an attitude so quixotic, the truth is that the claims represented by the appellants and their counsel are not for sale at any price. They commenced and are prosecuting this litigation to secure a judicial determination of their

rights by the tribunals set up for that purpose by the Constitution and laws of the United States; and there is no basis whatever for the appellee's unjustifiable insinuation that they can be bought off short of the attainment of that objective.

(2) If there has been any misuse or abuse of federal judicial processes in this litigation, it is chargeable against appellee's counsel for their sinister contempt proceeding designed indubitably to vex and harass the appellants in invoking the appellate jurisdiction of this Court.

In spite of the contrary view of the District Court whose contempt order is based upon a misconstruction and misapplication of the injunctive provisions of the decree of the Bankruptcy Court in the proceeding 26,591-S, there was no violation thereof by the filing of the successoral Bill of Complaint. We think this is the law of this case, as determined by this Court in the earlier Action No. 12,506. Both proceedings are in principle identical in that they were brought against the defendant Western Pacific Railroad Company under the Assumption Agreement which it executed in accordance with a vital condition prescribed in the final orders in the bankruptcy proceeding; both proceedings were brought to require the reorganized defendant Western Pacific Railroad Company to account for the use by the reorganization trustees of a tax credit belonging *not* to the trustees and *not* to the debtor in bankruptcy but belonging exclusively to appellant Western Pacific Railroad Corporation.

Judge Fee explained this in footnote 6 to his dissenting opinion in No. 12,506 wherein he said:

> "The error of the lower Court was in assuming that the plaintiff is seeking an interest in the defendant corporation instead of property which belonged to the plaintiff."

There was no disagreement with this conclusion expressed in the majority opinion of Judges Healy and Byrne; and if there had been such disagreement it would have ended the case forthwith on the defendant's plea of *res adjudicata.* What happened was that Judges Healy and Byrne treating the case as wide open (as clearly it was) decided it *not* in favor of the defendant Western Pacific Railroad Company as its counsel persists in pretending they did; but decided it *against* the appellants *as sole stockholder* of the bankrupt debtor on the ground that the creditors of the bankrupt debtor were the real beneficiaries. We cite the prior decision of this Court in No. 12,506 *Western Pacific Railroad Corporation, et al. v. Western Pacific Railroad Company, et al.,* 197 Fed. 2d 994, as *res adjudicata* upon the question, if there ever was one, whether the institution of the former suit or of this suit violates the injunction in the final decree in the reorganization proceeding, 26,591-S.

(3) The appeals pending in this Court are not frivolous and are meritorious, presenting among other ones, the following substantial questions:

(a) Is this successoral action an equity properly brought under an original bill in the nature of a sup-

plemental bill to implement and carry into effect the determination of this Court in No. 12,506?[1]

(b) Did the Bankruptcy Court have power to cancel and did it intend to cancel the valid and subsisting indebtedness of the debtor which had been proved and allowed in the Bankruptcy proceedings?[2]

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[1]A successoral Bill of Complaint, being an original bill in the nature of a supplemental bill to enforce and carry into effect a determination or decree of the same Court or of a different Court as the exigencies of the case or the interest of the parties may require, is traditional in our equity jurisprudence. Storey's Equity Pleading Sections 20-21, 336-340, 350. See also Section 349 and authorities cited in the text, including *Shields v. Thomas*, 18 How. 253. The terminology is that of the late Circuit Judge Walter H. Sanborn. At the winding up of the reorganization in 1897 of Union Pacific Railway Company under consolidated creditors and foreclosure bills, a number of properties had not been reached by either of them because of the limited framework of the bills themselves; the location of the properties; the absence of interested parties or the existence of special equities. To bring in these properties and adjust these equities, Judge Sanborn directed the filing—in some cases by the original receivers—of successoral bills of complaint and in at least one instance appointed successoral receivers.

[2]Title II—Sec. 205(f) of the United States Code provides:

> "Upon confirmation of the plan, the debtor and very often corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the orders of the judge relative thereto, under and subject to the supervision and control of the judge, the laws of any state or the decision or order of any state authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, *or where retained by the debtor pursuant to the plan*, shall be free of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities except such as may consistently with the plan be reserved."

This is the statutory authority under which the District Court made the order cancelling the unpaid indebtedness of the debtor and obviously the cancellation is only a discharge thereof *against the debtor*. The Bankruptcy Court has no power whatever to cancel the indebtedness of the debtor so as to prevent its en-

(c) Is the judgment or decree of the District Court entered under mandate of this Court in No. 12,506, brought by the appellant Western Pacific Railroad Corporation in its capacity as sole stockholder and parent in consolidated federal tax returns, a bar to the prosecution of this successoral action brought in the Court by the same appellant in its capacity as unsatisfied creditor to reach property which does not now or never did belong to the debtor or its successor in reorganization?[3]

(d) Is the defendant Railroad Company entitled to the fund of $17,201,739.00?[4]

Finally there is a motion to dismiss the appeal in No. 14,501 on the ground that it is interlocutory and non-appealable.

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forcement against some person, corporation or property secondarily liable. In *Ecker, et al. v. Western Pacific Railroad Corporation, et al.*, 318 U.S. 448, the Supreme Court held that the Bankruptcy Court had no power to cancel accommodation collateral. From whence then does it derive the authority (except as to this debtor) to cancel the primary indebtedness for which the accommodation collateral stands as security? To borrow one of the intemperate terms of our talented adversary, the motion is "*preposterous*".

[3]To make a former judgment a bar to the maintenance of a later suit "there must be identity of the quality in or for whom the claim is made, or, in other words, identity of the parties in the character in which they are litigants." Corpus Juris 1165, citing *Washington etc. Steam Packet Company v. Sickles*, 24 How. 333; *Elliott v. Hudson, et al.*, 18 Cal. App. 642. And it is essential under the *Duchess of Kingston's* case upon which the whole modern doctrine of *res adjudicata* is constructed that the decision be upon the *merits*. Where are we to find in the prior decisions and opinions in this litigation any suggestion that the defendant Western Pacific Railroad Company is entitled to the money?

[4]We plight our faith in the prior decision of this Court that the creditors of the debtor company, which under the rule of reason means the *unsatisfied* creditors, are entitled to full and complete payment before any part of the remitted taxes are adjudged to belong to any other party.

Again we disagree.

The contempt order is a non-factual, purely legal determination (we think an erroneous one) that the filing of the appellant's Bill of Complaint was a violation of the injunction in the final decree of the Bankruptcy Court in No. 20591-S. As such it was final, appealable and is properly within the reviewing power of this Court.

In further opposition to said motions, appellants file herewith an Affidavit of Leroy R. Goodrich, the attorney for the Western Pacific Railroad Corporation in this litigaton, together with a copy of a letter sent by the Receiver, Alexis I. du Pont Bayard, to the President of the appellee railroad company on September 14, 1954, and a copy of the reply sent by W. B. Whitman to said Receiver on September 24, 1954.

All of which is respectfully submitted.
Dated, October 14, 1954.

WESTERN PACIFIC RAILROAD CORPORATION,
ALEXIS I. DU PONT BAYARD, Receiver,
Appellants.

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR.,
JAMES R. MORFORD,
Counsel.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,515

The Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver,
Appellants,
vs.
The Western Pacific Railroad Company,
Appellee.

AFFIDAVIT OF LEROY R. GOODRICH

State of California,
County of Alameda.—ss.

Leroy R. Goodrich, being first duly sworn, deposes and says:

(1) That I am the attorney for The Western Pacific Railroad Corporation, appellant in the above entitled proceeding;

(2) That Alexis I. du Pont Bayard is the Receiver of The Western Pacific Railroad Corporation; that as such Receiver on September 14, 1954, upon the advice of his counsel, Mr. Bayard sent to F. B. Whitman, President of The Western Pacific Railroad

Company, the appellee in the above entitled matter, a letter, a copy of which is attached hereto and marked Exhibit A;

(3) That I am informed by Mr. Bayard that on September 24, 1954, F. B. Whitman, President of the appellee railroad company, sent to Mr. Bayard a reply, a copy of which is attached hereto and marked Exhibit B.

Leroy R. Goodrich.

Subscribed and sworn to before me this 14th day of October, 1954.

(Seal) Marion Treml,
Notary Public in and for the County of Alameda, State of California.
My commission expires March 18, 1956.

EXHIBIT A

Alexis I. du Pont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclos-

ing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you will be unable to redeem the shares which it will be necessary to redeem, I respectfully suggest that your circular is fatally defective in withholding from your Preferred Stockholders full and correct information respecting the pending appeals.

Even if the Interstate Commerce Commission should approve the proposed exchange and authorize the new securities the transaction may well be invalidated by the Courts.

Accordingly we are sending a copy of this letter to the Chairman of Division 4 and to the Director of the Bureau of Finance of the Interstate Commerce Commission, with the suggestion that the applications for Interstate Commerce Commission approval be dismissed for deficiencies in this circular of September 8, 1954, or that the applications be held in abeyance pending the determination of the appeals now on the Docket of the Court of Appeals for the Ninth Circuit.

May I ask that you bring this letter to the attention of Blyth & Company, Inc. and Union Securities Corporation, the underwriters.

Yours very truly,

Alexis I. du Pont Bayard
Alexis I. du Pont Bayard
Receiver of Western Pacific
Railroad Corporation

AIduPB:DeH

EXHIBIT B

The Western Pacific Railroad Company
Western Pacific Building
526 Mission Street
San Francisco 5 California

September 24, 1954

W. B. Whitman
President
Mr. Alexis I. du Pont Bayard
Star Building
Wilmington, Delaware

Dear Sir:

This refers to your letter of September 14, 1954 and to what I consider to be a wholly unwarranted interference in the affairs of The Western Pacific Railroad Company.

In extensive litigation, both inside and outside of the reorganization proceeding, it has been finally and conclusively determined that The Western Pacific Railroad Corporation has no claim against The Western Pacific Railroad Company. Your attempt in the proceeding now pending to assert once more these claims determined to be without merit has been held to be a contempt of court and characterized by the District Judge as an affront to the judicial process.

Since I am compelled to conclude that your letter of September 14, 1954 and your attempt to interfere with the Western Pacific refinancing is purely

vexatious and since I am advised by counsel that your duties as receiver of the Corporation do not extend to interference in the affairs of the Company, you will please take notice that The Western Pacific Railroad Company will, in addition to such other steps as it may be advised, hold you, your advisors and those associated with you personally responsible for any loss or inconvenience to it resulting from your letter of September 14, 1954 and your activities in that connection.

A copy of this letter will be sent to the Interstate Commerce Commission.

Very truly yours,

F. B. Whitman

F. B. Whitman